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But as with Exemption 7(A), invoking Exemption 7(D) in response to a FOIA request tells the requester that somewhere within the records encompassed by his particular request there is reference to at least one confidential source. Again, under ordinary circumstances the disclosure of this fact poses no direct threat. But under certain extraordinary circumstances, this disclosure could result in devastating harms to the source and to the system of confidentiality existing between sources and criminal law enforcement agencies.

The scenario in which the exclusion is most likely to be employed is one in which the ringleaders of a criminal enterprise suspect that they have been infiltrated by a source and therefore force all participants in the criminal venture either to directly request that any law enforcement files on them be disclosed to the organization or to execute privacy waivers authorizing disclosure of their files in response to a request from the organization. Absent the (c)(2) exclusion, a law enforcement agency could effectively be forced to disclose information to the subject organization (i.e., through the very invocation of Exemption 7(D)) indicating that the named individual is a confidential source.²⁵

The (c)(2) exclusion is principally intended to address this unusual, but dangerous situation, by permitting an agency to escape the necessity of giving a response that would be tantamount to identifying a named party as a law enforcement source.²⁶ Any criminal law enforcement agency is authorized to treat such requested records, within the extraordinary context of such a FOIA request, as beyond the FOIA's reach. As with the (c)(1) exclusion, the agency would have "no obligation to acknowledge the existence of such records in response to such request."²⁷

By its terms, the exclusion simply becomes inapplicable once the individual's status as a source has been officially confirmed.²⁸ But by merely confirming a source's status as such, a law enforcement agency does not thereby obligate itself to confirm the existence of any specific records regarding that source.²⁹ Thus, the (c)(2) exclusion cannot be read to automatically require disclosure of source-related information once a source has been officially acknowledged,³⁰ so

²⁵ See Attorney General's 1986 Amendments Memorandum at 23; Tanks, No. 95-568, slip op. at 12 (D.D.C. May 28, 1996).

²⁶ See Attorney General's 1986 Amendments Memorandum at 23-24; Tanks, No. 95-568, slip op. at 12 (D.D.C. May 28, 1996).

²⁷ S. Rep. No. 98-221, at 25 (1983).

²⁸ See 5 U.S.C. § 552(c)(2); Tanks, No. 95-568, slip op. at 12-13 (D.D.C. May 28, 1996).

²⁹ See Tanks, No. 95-568, slip op. at 12-13 (D.D.C. May 28, 1996).

³⁰ See Benavides v. DEA, 968 F.2d 1243, 1248 (D.C. Cir.) ("There is no evidence that Congress intended subsection (c)(2) to repeal or supersede the other enumerated FOIA exemptions or to require disclosure whenever the informant's

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long as such information may properly be protected under a FOIA exemption.³¹

A criminal law enforcement agency forced to employ this exclusion should do so in the same fashion as it would employ the (c)(1) exclusion already discussed.³² It is imperative that all information which ordinarily would be disclosed to a first-party requester, other than information which would reflect that an individual is a confidential source, be disclosed. If, for example, the Federal Bureau of Investigation were to respond to a request for records pertaining to an individual having a known record of federal prosecutions by replying that "there exist no records responsive to your FOIA request," the interested criminal organization would surely recognize that its request had been afforded extraordinary treatment and would draw its conclusions accordingly. Therefore, the (c)(2) exclusion must be employed in a manner entirely consistent with its source-protection objective.

The (c)(3) Exclusion

The third of these special record exclusions pertains only to certain law enforcement records that are maintained by the FBI.³³ The "(c)(3) exclusion" provides as follows:

Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in [Exemption 1], the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of [the FOIA].³⁴

³⁰(...continued)

status has been officially confirmed."), modified on other grounds, 976 F.2d 751, 753 (D.C. Cir. 1992).

³¹ See id. at 1248 ("The legislative history suggests, in fact, that Congress intended to permit the DEA to withhold documents under 7(C) and 7(D), even if the agency must, under subsection (c)(2), acknowledge their existence."); Tanks, No. 95-568, slip op. at 13 (D.D.C. May 28, 1996) ("Accepting the status of [two named individuals] as government informants, the FBI explained why disclosure of any information in its files unrelated to the Plaintiff and his prosecution would constitute an unwarranted invasion of personal privacy pursuant to Exemption 7(C), 5 U.S.C. § 552(b)(7)(C).").

³² See Attorney General's 1986 Amendments Memorandum at 24.

³³ See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 24-27 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

³⁴ 5 U.S.C. § 552(c)(3) (1994), as amended by Electronic Freedom of
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This exclusion recognizes the exceptional sensitivity of the FBI's activities in the areas of foreign intelligence, counterintelligence, and the battle against international terrorism, as well as the fact that the classified files of these activities can be particularly vulnerable to targeted FOIA requests. Sometimes, within the context of a particular FOIA request, the very fact that the FBI does or does not hold any records on a specified person or subject can itself be a sensitive fact, properly classified in accordance with the applicable executive order on the protection of national security information³⁵ and protectible under FOIA Exemption 1.³⁶ Once again, however, the mere invocation of Exemption 1 to withhold such information can provide information to the requester which would have an extremely adverse effect on the government's interests. In some possible contexts, the furnishing of an actual "no records" response, even to a seemingly innocuous "first-party" request, could compromise sensitive activities.³⁷

The FOIA Reform Act took cognizance of this through the (c)(3) exclusion, in which it authorizes the FBI to protect itself against such harm in connection with any of its records pertaining to these three, especially sensitive, areas. To do so, the FBI must of course reach the judgment, in the context of a particular request, that the very existence or nonexistence of responsive records is itself a classified fact and that it need employ this record exclusion to prevent its disclosure.³⁸ By the terms of this provision, the excluded records may be treated as such so long as their existence, within the context of the request, "remains classified information."³⁹

Additionally, it should be noted that while the statute refers to records maintained by the FBI, exceptional circumstances could possibly arise in which it would be appropriate for another component of the Department of Justice or another federal agency to invoke this exclusion.⁴⁰ Such a situation could occur where information in records of another component or agency is derived from FBI records which fully qualify for (c)(3) exclusion protection. In such extraor-

³⁴(...continued)

Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

³⁵ See Exec. Order No. 12,958, 3 C.F.R. 333 (1996), reprinted in 50 U.S.C. § 435 note (Supp. I 1996) and reprinted in abridged form in FOIA Update, Spring/Summer 1995, at 5-10 (superseding Exec. Order No. 12,356 as of Oct. 14, 1995).

³⁶ See 5 U.S.C. § 552(b)(1); see also Attorney General's 1986 Amendments Memorandum at 25.

³⁷ See Attorney General's 1986 Amendments Memorandum at 25.

³⁸ See id.

³⁹ 5 U.S.C. § 552(c)(3); see also FOIA Update, Spring/Summer 1995 at 1-2, 11 (noting that new executive order places greater emphasis on limited classification and declassification).

⁴⁰ See Attorney General's 1986 Amendments Memorandum at 25 n.45.

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dinary circumstances, the agency processing the derivative information should consult with the FBI regarding the possible joint invocation of the exclusion in order to avoid a potentially damaging inconsistent response.⁴¹

Procedural Considerations

Several procedural considerations regarding the implementation and operation of these special record exclusions should be noted. First, it should be self-evident that the decision to employ an exclusion in response to a particular request must not be reflected on anything made available to the requester. When an agency reaches the judgment that it is necessary to employ an exclusion, it should do so as a specific official determination that is reviewed carefully by appropriate supervisory agency officials.⁴² The particular records covered by an exclusion action should be concretely and carefully identified and segregated from any responsive records that are to be processed according to ordinary procedures.⁴³

It must be remembered that providing a "no records" response as part of an exclusion strategy does not insulate the agency from either administrative or judicial review of the agency's action. The recipient of a "no records" response may challenge it because he believes that the agency has failed to conduct a sufficiently detailed search to uncover the requested records.⁴⁴ Alternately, any requester, mindful of the exclusion mechanism and seeking information of a nature which could possibly trigger an exclusion action, could seek review in an effort to pursue his suspicions and to have a court determine whether an exclusion, if in fact used, was appropriately employed.

Moreover, because the very objective of the exclusions is to preclude the requester from learning that there exist such responsive records, all administrative appeals and court cases involving a "no records" response must receive extremely careful attention. If one procedure is employed in adjudicating appeals or litigating cases in which there are genuinely no responsive records, and any different course is followed where an exclusion is in fact being used, sophisticated requesters could quickly learn to distinguish between the two and defeat an exclusion's very purpose.⁴⁵

Consequently, agencies should prepare in advance a uniform procedure to

⁴¹ See id.

⁴² See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 27 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

⁴³ See id.

⁴⁴ See id. at 29; see also Oglesby v. United States Dep't of the Army, 920 F.2d 57, 67 (D.C. Cir. 1990).

⁴⁵ See Attorney General's 1986 Amendments Memorandum at 29.

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handle administrative appeals and court challenges which seek review of the possibility that an exclusion was employed in a given case. In responding to administrative appeals from "no record" responses,⁴⁶ agencies should accept any clear request for review of the possible use of an exclusion and specifically address it in evaluating and responding to the appeal.⁴⁷

In the exceptional case in which an exclusion was in fact invoked, the appellate review authority should examine the correctness of that action and come to a judgment as to the exclusion's continued applicability as of that time.⁴⁸ In the event that an exclusion is found to have been improperly employed or to be no longer applicable, the appeal should be remanded for prompt processing of all formerly excluded records, with the requester advised accordingly.⁴⁹ Where it is determined either that an exclusion was properly employed or that, as in the overwhelming bulk of cases, no exclusion was used, the result of the administrative appeal should be, by all appearances, the same: The requester should be specifically advised that this aspect of his appeal was reviewed and found to be without merit.⁵⁰

Such administrative appeal responses, of course, necessarily must be stated in such a way that does not indicate whether an exclusion was in fact invoked.⁵¹ Moreover, in order to preserve the effectiveness of the exclusion mechanism, requesters who inquire in any way whether an exclusion has been used should routinely be advised that it is the agency's standard policy to refuse to confirm or deny that an exclusion was employed in any particular case.⁵²

Exclusion issues in court actions must be handled with similarly careful and thoughtful preparation. First, it need be recognized that any judicial review of a suspected exclusion determination must of course be conducted *ex parte*, based upon an *in camera* court filing submitted directly to the judge.⁵³ Second, it is essential to the integrity of the exclusion mechanism that requesters not be able

⁴⁶ See FOIA Update, Spring 1991, at 5 ("OIP Guidance: Procedural Rules Under the D.C. Circuit's Oglesby Decision") (agencies obligated to advise any requester who receives "no record" response of its procedures for filing administrative appeal) (superseding FOIA Update, Summer 1984, at 2).

⁴⁷ See Attorney General's 1986 Amendments Memorandum at 29 (superseded in part by FOIA Update, Spring 1991, at 5).

⁴⁸ See id. at 28.

⁴⁹ See id.

⁵⁰ See id. at 28-29.

⁵¹ See id. at 29.

⁵² See id. at 29 & n.52.

⁵³ See id. at 29; see also Steinberg v. United States Dep't of Justice, No. 93-2409, 1997 WL 349997, at *1 (D.D.C. June 18, 1997).

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to determine whether an exclusion was employed at all in a given case based upon how any case is handled in court. Thus, it is critical that the in camera defenses of exclusion issues raised in FOIA cases occur not merely in those cases in which an exclusion actually was employed and is in fact being defended.⁵⁴

Accordingly, it is the government's standard litigation policy in the defense of FOIA lawsuits that, whenever a FOIA plaintiff raises a distinct claim regarding the suspected use of an exclusion, the government will routinely submit an in camera declaration addressing that claim, one way or the other.⁵⁵ When an exclusion was in fact employed, the correctness of that action will be justified to the court. When an exclusion was not in fact employed, the in camera declaration will state simply that it is being submitted to the court so as to mask whether or not an exclusion is being employed, thus preserving the integrity of the exclusion process overall.⁵⁶ In either case, the government will of course urge the court to issue a public decision which does not indicate whether it is or is not an actual exclusion case. Such a public decision, like an administrative appeal determination of an exclusion-related request for review, should specify only that a full review of the claim was had and that, if an exclusion was in fact employed, it was, and remains, amply justified.⁵⁷

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The Freedom of Information Act is an information disclosure statute which, through its exemption structure, strikes an overall balance between information

⁵⁴ See Attorney General's 1986 Amendments Memorandum at 29.

⁵⁵ See id. at 30; see also, e.g., Steinberg, 1997 WL 349997, at *1 ("[T]he government is permitted to file an in camera declaration, which explains either that no exclusion was invoked or that the exclusion was invoked appropriately."); Steinberg v. United States Dep't of Justice, No. 91-2740, slip op. at 4-5 (D.D.C. Dec. 2, 1993) (agency "volunteered an in camera submission related to the allegation of covert reliance on § 552(c)").

⁵⁶ See Attorney General's 1986 Amendments Memorandum at 30.

⁵⁷ See id.; see also, e.g., Steinberg, 1997 WL 349997, at *1 (where plaintiff alleged possible use of exclusion, "without confirming or denying the existence of any exclusion, the Court finds and concludes [after review of in camera declaration] that if an exclusion was invoked, it was and remains amply justified"); Beauman v. FBI, No. CV-92-7603, slip op. at 2 (C.D. Cal. Apr. 12, 1993) ("In response to the plaintiff's claim of the (c)(1) exclusion being utilized in this action, . . . [w]ithout confirming or denying that any such exclusion was actually invoked by the defendant, the Court finds and concludes [after review of an in camera declaration] that if an exclusion was in fact employed, it was, and remains, amply justified." (adopting agency's proposed conclusion of law)).

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disclosure and nondisclosure,¹ with an emphasis on the "fullest responsible disclosure."² Inasmuch as the FOIA's exemptions are discretionary, not mandatory,³ agencies are free to make "discretionary disclosures" of exempt information, as a matter of sound policy, whenever they are not otherwise prohibited from doing so.⁴

The statements of FOIA policy issued by President Clinton and Attorney General Janet Reno on October 4, 1993,⁵ together set forth a strong policy of openness in government, in which the making of discretionary FOIA disclosures plays a prominent part.⁶ President Clinton's FOIA Memorandum emphasizes that "the more the American people know about their government, the better they will be governed."⁷ In turn, Attorney General Reno's FOIA Memorandum establishes a "foreseeable harm" standard governing the use of FOIA exemptions, regardless of whether the information in question "might technically or arguably fall within

¹ See John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989).

² S. Rep. No. 89-813, at 3 (1965); see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 30 (Dec. 1987); FOIA Update, Summer 1988, at 14.

³ See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) ("FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information").

⁴ See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1334 n.1 (D.C. Cir. 1987) (An agency's FOIA disclosure decision can "be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions."); see also Chenkin v. Department of the Army, No. 94-7109, slip op. at 1 (3d Cir. June 7, 1995) (discretionary disclosure of documents during appellate litigation process renders case moot as to those documents); FOIA Update, Summer 1985, at 3 ("[A]gencies generally have discretion under the Freedom of Information Act to decide whether to invoke applicable FOIA exemptions."); cf. FOIA Update, Spring 1992, at 5-6 (discussing exercise of agency discretion in processing of requests for information maintained in electronic form).

⁵ President's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993) [hereinafter President Clinton's FOIA Memorandum], reprinted in FOIA Update, Summer/Fall 1993, at 3; Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993) [hereinafter Attorney General Reno's FOIA Memorandum], reprinted in FOIA Update, Summer/Fall 1993, at 4-5.

⁶ See FOIA Update, Summer/Fall 1993, at 1.

⁷ President Clinton's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 3.

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an exemption."⁸ As an essential corollary to that, and based upon the principle that information "ought not to be withheld from a FOIA requester unless it need be," Attorney General Reno's FOIA Memorandum states:

Accordingly, I strongly encourage [all] FOIA officers to make "discretionary disclosures" whenever possible under the Act. Such disclosures are possible under a number of FOIA exemptions, especially when only a governmental interest would be affected.⁹

When agencies make discretionary disclosures of exempt information "as a matter of good public policy" under Attorney General Reno's FOIA Memorandum,¹⁰ they should not be held to have "waived" their ability to invoke applicable FOIA exemptions for similar or related information in the future. In other situations, however, various types of agency conduct and circumstances can reasonably be held to result in exemption waiver.

Discretionary Disclosure

As a general rule, an agency's ability to make a discretionary disclosure of exempt information in accordance with Attorney General Reno's FOIA Memorandum¹¹ will vary according to the nature of the FOIA exemption and the underlying interests involved. First, while the FOIA does not itself prohibit the disclosure of any information,¹² an agency's ability to make a discretionary disclosure of information covered by a FOIA exemption can hinge on whether there exists any legal barrier to disclosure of that information. Some of the FOIA's exemptions--such as Exemption 2¹³ and Exemption 5,¹⁴ for example--protect a type of information that is not subject to any such disclosure prohibition. Other

⁸ Attorney General Reno's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 4-5.

⁹ Id.

¹⁰ See id.; see also FOIA Update, Spring 1997, at 1 (describing Attorney General's reiteration of importance of "foreseeable harm" standard to federal agencies in order to promote further discretionary disclosure in agency decision-making).

¹¹ Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993) [hereinafter Attorney General Reno's FOIA Memorandum], reprinted in FOIA Update, Summer/Fall 1993, at 4-5.

¹² See 5 U.S.C. § 552(d) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

¹³ Id. § 552(b)(2).

¹⁴ Id. § 552(b)(5).

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FOIA exemptions--most notably Exemption 3¹⁵--directly correspond to, and serve to accommodate, distinct prohibitions on information disclosure that operate entirely independently of the FOIA. Agencies are constrained from making a discretionary FOIA disclosure of the types of information covered by the following FOIA exemptions:

Exemption 1 of the FOIA protects from disclosure national security information concerning the national defense or foreign policy, provided that it has been properly classified in accordance with both the substantive and procedural requirements of an existing executive order.¹⁶ As a general rule, an agency official holding classification authority determines whether any particular information requires classification and then that determination is implemented under the FOIA through the invocation of Exemption 1.¹⁷ Thus, if information is in fact properly classified, and therefore is exempt from disclosure under Exemption 1, it is not appropriate for discretionary FOIA disclosure. (See discussion of Exemption 1, above.)

Exemption 3 of the FOIA explicitly accommodates the nondisclosure provisions that are contained in a variety of other federal statutes. Some of these statutory nondisclosure provisions, such as those pertaining to grand jury information¹⁸ and census data,¹⁹ categorically prevent disclosure harm and establish absolute prohibitions on agency disclosure; others leave agencies with some discretion as to whether to disclose certain information, but such administrative discretion generally is exercised independently of the FOIA.²⁰ (See discussion of Exemption 3, above.) Therefore, agencies ordinarily do not make discretionary disclosure under the FOIA of information that falls within the scope of Exemption 3.²¹

¹⁵ Id. § 552(b)(3).

¹⁶ Id. § 552(b)(1) (implementing Exec. Order No. 12,958, 3 C.F.R. 333 (1996), reprinted in 50 U.S.C. § 435 note (Supp. I 1996) and reprinted in abridged form in FOIA Update, Spring/Summer 1995, at 5-10.

¹⁷ See generally FOIA Update, Winter 1985, at 1-2.

¹⁸ See Fed. R. Crim. P. 6(e) (enacted as statute in 1977).

¹⁹ See 13 U.S.C. §§ 8(b), 9(a) (1994).

²⁰ See, e.g., Aronson v. IRS, 973 F.2d 962, 966 (1st Cir. 1992).

²¹ See, e.g., Association of Retired R.R. Workers v. Railroad Retirement Bd., 830 F.2d 331, 335 (D.C. Cir. 1987) (FOIA jurisdiction does not extend to exercise of agency disclosure discretion within Exemption 3 statute); see also FOIA Update, Fall 1994, at 7 (describing firm limitation imposed on disclosure of "tax return information" under 26 U.S.C. § 6103). But see Palmer v. Derwinski, No. 91-197, slip op. at 3-4 (E.D. Ky. June 10, 1992) (exceptional FOIA case in which court ordered Veterans Administration to disclose existence of certain medical records pursuant to discretionary terms of 38 U.S.C. § 7332(b) (1994)).

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Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."²² For the most part, Exemption 4 protects information implicating private commercial interests that would not ordinarily be the subject of discretionary FOIA disclosure. (See discussions of Exemption 4, above, and "Reverse" FOIA, below.) Even more significantly, a specific criminal statute, the Trade Secrets Act,²³ prohibits the unauthorized disclosure of most (if not all) of the information falling within Exemption 4; its practical effect is to constrain an agency's ability to make a discretionary disclosure of Exemption 4 information,²⁴ absent an agency regulation (based upon a federal statute) that expressly authorizes disclosure.²⁵ (See discussion of this point under "Reverse" FOIA, below.)

Exemptions 6 and 7(C) of the FOIA protect personal privacy interests, in non-law enforcement records²⁶ and law enforcement records,²⁷ respectively. As with private commercial information covered by Exemption 4, the personal information protected by Exemptions 6 and 7(C) is not the type of information ordinarily considered appropriate for discretionary FOIA disclosure; with these exemptions, a balancing of public interest considerations is built into the determination of whether the information is exempt in the first place. (See discussions of this issue under Exemption 6 and Exemption 7(C), above.) Moreover, the personal information covered by Exemptions 6 and 7(C) in many cases falls within the protective coverage of the Privacy Act of 1974,²⁸ which mandates that any such information concerning U.S. citizens and permanent-resident aliens that is maintained in a "system of records"²⁹ not be disclosed unless that disclosure is permitted under one of the specific exceptions to the Privacy Act's general disclosure prohibition.³⁰ Inasmuch as the FOIA-disclosure exception in the Privacy Act permits only those disclosures that are "required" under the FOIA,³¹ the making of discretionary FOIA disclosures of personal information is fundamentally

²² 5 U.S.C. § 552(b)(4).

²³ 18 U.S.C. § 1905 (1994).

²⁴ See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1144 (D.C. Cir. 1987); see also FOIA Update, Summer 1985, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4").

²⁵ See Chrysler v. Brown, 441 U.S. 281, 295-96 (1979); see, e.g., St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 409-10 (5th Cir. 1979).

²⁶ 5 U.S.C. § 552(b)(6).

²⁷ Id. § 552(b)(7)(C).

²⁸ Id. § 552a (1994) (amended 1996, 5 U.S.C.A. § 552a (West Supp. 1997)).

²⁹ Id. § 552a(a)(5).

³⁰ Id. § 552a(b).

³¹ Id. § 552a(b)(2).

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incompatible with the Privacy Act and, in many instances, is prohibited by it.³²

With the exception of information that is subject to the disclosure prohibitions accommodated by the above FOIA exemptions, agencies may make discretionary disclosures of any information that is exempt under the FOIA. As Attorney General Reno's FOIA Memorandum explicitly points out, such disclosures are most appropriate when the interest protected by the exemption in question is "only a governmental interest" of the agency (rather than a private interest of an individual or commercial entity)--one that the agency may choose to forego as an exercise of sound administrative discretion in furtherance of the objectives of government openness and "maximum responsible disclosure" under the Act.³³ While it does not create any justiciable rights for requesters in FOIA litigation,³⁴ the "foreseeable harm" standard established by Attorney General Reno's FOIA Memorandum serves to promote such disclosures whenever possible.³⁵

A prime example is the type of administrative information that can fall within the "low 2" aspect of Exemption 2, which was uniquely designed to shield agencies from sheer administrative burden rather than from any substantive disclosure harm. (See discussion of Exemption 2, above.) In many instances, especially when the information in question is a portion of a document page not otherwise exempt in its entirety, such information is more efficiently released than withheld.³⁶ As a practical matter, moreover, nearly all "low 2" information should be appropriate for discretionary disclosure upon application of the "foreseeable harm" standard of Attorney General Reno's FOIA Memorandum.³⁷

³² See DOD v. FLRA, 964 F.2d 26, 30-31 n.6 (D.C. Cir. 1992) (discussing Privacy Act's limitations on discretionary FOIA disclosure); see also FOIA Update, Summer 1984, at 2 (discussing interplay between FOIA and Privacy Act); cf. Crumpton v. United States, 843 F. Supp. 751, 756 (D.D.C. 1994) (disclosure under FOIA of personal information not subject to Privacy Act creates no liability under Federal Tort Claims Act (FTCA), given applicability of FTCA's discretionary function exception), aff'd on other grounds sub nom. Crumpton v. Stone, 59 F.3d 1400 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1018 (1996).

³³ Attorney General Reno's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 4-5.

³⁴ See id.; see, e.g., Spannaus v. United States Dep't of Justice, 942 F.2d 656, 658 (D.D.C. 1996) (refusing to review agency "foreseeable harm" determination as possible abuse of administrative discretion).

³⁵ See id.; see also FOIA Update, Spring 1997, at 1; FOIA Update, Spring 1994, at 3.

³⁶ See FOIA Update, Winter 1984, at 11-12 ("FOIA Counselor: The Unique Protection of Exemption 2") (advising agencies not to invoke exemption heedlessly).

³⁷ See also FOIA Update, Spring 1994, at 3 (distinguishing between "low 2" and "high 2" aspects of Exemption 2).

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By far, the most common examples of information appropriate for discretionary FOIA disclosure can be found under Exemption 5, which incorporates discovery privileges that almost always protect only the institutional interests of the agency possessing the information. (See discussion of Exemption 5, above.) Information that might otherwise be withheld under the deliberative process privilege for the purpose of protecting the deliberative process in general can be disclosed when to do so would cause no "foreseeable harm" to any particular process of agency deliberation.³⁸ A range of factors--including the particular circumstances of the decisionmaking process involved, as well as the passage of time--can compel the conclusion that such information should be disclosed as a matter of administrative discretion.³⁹ (For a detailed discussion, see Exemption 5, Applying the "Foreseeable Harm" Standard, above.)

Many litigation-related records that otherwise might routinely be withheld under Exemption 5's attorney work-product privilege can be disclosed on the same basis.⁴⁰ This privilege broadly covers practically all information prepared in connection with litigation, without any temporal limitation whatsoever. (See discussion of Exemption 5, Attorney Work-Product Privilege, above.) Consequently, it holds an exceptionally large potential for the making of discretionary disclosures both after the conclusion of litigation--and even during the course of litigation--upon consideration of certain basic elements of harm.⁴¹ This is likewise possible for information covered by the attorney-client privilege of Exemption 5.⁴² (See Exemption 5, Applying the "Foreseeable Harm" Standard, above, for a detailed discussion of all three major privileges of Exemption 5 in this regard.)

The potential held by other FOIA exemptions for discretionary disclosure upon application of the "foreseeable harm" standard necessarily varies from exemption to exemption. Overall, the greatest potential for making such disclosures should be found, as Attorney General Reno's FOIA Memorandum indicates, in the FOIA exemptions (or parts of exemptions) designed to protect "governmental

³⁸ See, e.g., FOIA Update, Spring 1994, at 1 (describing discretionary disclosure of entire document found properly withheld in Mapother v. Department of Justice, 3 F.3d 1533 (D.C. Cir. 1993)).

³⁹ See FOIA Update, Spring 1994, at 3-5; see, e.g., FOIA Update, Fall 1994, at 7; see also FOIA Update, Summer/Fall 1993, at 2.

⁴⁰ See, e.g., FOIA Update, Summer 1985, at 5 (encouraging consideration of discretionary disclosure of attorney work-product information when possible to do so without causing harm to litigation process).

⁴¹ See FOIA Update, Spring 1994, at 5-6.

⁴² See id. at 6.

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interests."⁴³ Exemption 7(E),⁴⁴ for example, affords very broad coverage of "law enforcement techniques" in its first clause, and therefore holds much potential for discretionary disclosure.⁴⁵ (See discussion of Exemption 7(E), above.)

Similarly, the second clause of Exemption 7(D)⁴⁶ broadly covers all information furnished by confidential sources in criminal investigations, regardless of its source-identification utility; the Department of Justice has specifically changed its policy for the treatment of such information in order to encourage its discretionary disclosure whenever that is possible without foreseeable source identification and harm.⁴⁷ (See discussion of Exemption 7(D), above.) Likewise, the broad coverage of bank examination reports and related records that is afforded by Exemption 8⁴⁸ holds strong potential for discretionary disclosure as well. (See discussion of Exemption 8, above.) By contrast, other exemptions are more narrowly rooted with harm standards that do not hold such discretionary disclosure potential.⁴⁹

In this regard, it also should be remembered that the FOIA requires agencies to focus on individual portions of records in connection with the applicability of all exemptions of the Act and to disclose all individual, "reasonably segregable" record portions that are not covered by an exemption.⁵⁰ This focus is essential to meeting the Act's primary objective of "maximum responsible disclosure."⁵¹ As Attorney General Reno's FOIA Memorandum emphasizes,⁵² the satisfaction of this important statutory requirement can involve an onerous

⁴³ Attorney General Reno's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 4-5.

⁴⁴ 5 U.S.C. § 552(b)(7)(E).

⁴⁵ See FOIA Update, Spring 1994, at 3 (distinguishing between Exemption 7(E)'s two clauses).

⁴⁶ 5 U.S.C. § 552(b)(7)(D).

⁴⁷ See FOIA Update, Summer/Fall 1993, at 10; see also FOIA Update, Fall 1994, at 7 (describing such discretionary disclosure through process of Justice Department litigation review).

⁴⁸ 5 U.S.C. § 552(b)(8).

⁴⁹ See FOIA Update, Spring 1994, at 3.

⁵⁰ 5 U.S.C. § 552(b) (sentence immediately following exemptions); see also, e.g., PHE, Inc. v. Department of Justice, 983 F.2d 248, 252 (D.C. Cir. 1993) (both agency and court must determine whether any nonexempt information can be segregated from exempt information and released).

⁵¹ FOIA Update, Summer/Fall 1993, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation" (quoting Attorney General Reno's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 4-5)).

⁵² See id.

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delineation process, one that readily lends itself to the making of discretionary disclosures, particularly at the margins of FOIA exemption applicability.⁵³

Furthermore, as Attorney General Reno's FOIA Memorandum additionally points out,⁵⁴ making a discretionary disclosure under the FOIA can significantly lessen an agency's burden at all levels of the administrative process, and it also eliminates the possibility that the information in question will become the subject of protracted litigation--thus serving an additional public interest in the conservation of increasingly scarce agency resources.⁵⁵

As also is noted in Attorney General Reno's FOIA Memorandum, when an agency considers making a discretionary disclosure of exempt information under the FOIA, it should be able to do so free of any concern that in exercising its administrative discretion with respect to particular information it is impairing its ability to invoke applicable FOIA exemptions for any arguably similar information in the future.⁵⁶

Indeed, in the leading judicial precedent on this point, Mobil Oil Corp. v. EPA,⁵⁷ a FOIA requester argued that by making a discretionary disclosure of certain records that could have been withheld under Exemption 5, the agency had waived its right to invoke that exemption for a group of "related" records.⁵⁸ In rejecting such a waiver argument, however, the Court of Appeals for the Ninth Circuit surveyed the law of waiver under the FOIA and found "no case . . . in which the release of certain documents waived the exemption as to other documents. On the contrary, [courts] generally have found that the release of certain documents waives FOIA exemptions only for those documents released."⁵⁹

⁵³ See, e.g., Army Times Publ'g Co. v. Department of the Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993) (emphasizing significance of segregation requirement in connection with deliberative process privilege under Exemption 5); Wightman v. ATE, 755 F.2d 979, 983 (1st Cir. 1985) ("detailed process of segregation" held not unreasonable for request involving 36 pages).

⁵⁴ Attorney General Reno's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 4-5.

⁵⁵ See FOIA Update, Fall 1994, at 7 (listing examples of discretionary disclosure and resulting disposition of FOIA litigation cases through process of Justice Department litigation review).

⁵⁶ See Attorney General Reno's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 4-5.

⁵⁷ 879 F.2d 698 (9th Cir. 1989).

⁵⁸ Id. at 700.

⁵⁹ Id. at 701; see Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) ("[D]isclosure of a similar type of information in a different case does not

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Such a general rule of nonwaiver through discretionary disclosure is supported by sound policy considerations, as the Ninth Circuit in Mobil Oil discussed at some length:

Implying such a waiver could tend to inhibit agencies from making any disclosures other than those explicitly required by law because voluntary release of documents exempt from disclosure requirements would expose other documents [of a related nature] to risk of disclosure. An agency would have an incentive to refuse to release all exempt documents if it wished to retain an exemption for any documents [R]eadily finding waiver of confidentiality for exempt documents would tend to thwart the [FOIA's] underlying statutory purpose, which is to implement a policy of broad disclosure of government records.⁶⁰

In fact, this rule was presaged by the Court of Appeals for the District of Columbia Circuit many years ago, when it observed:

Surely this is an important consideration. The FOIA should not be construed so as to put the federal bureaucracy in a defensive or hostile position with respect to the Act's spirit of open government and liberal disclosure of information.⁶¹

As another court more recently phrased it: "A contrary rule would create an

⁵⁹(...continued)

mean that the agency must make its disclosure in every case."); Stein v. Department of Justice, 662 F.2d 1245, 1259 (7th Cir. 1981) (exercise of discretion should waive no right to withhold records of "similar nature"); Schiller v. NLRB, No. 87-1176, slip op. at 7 (D.D.C. July 10, 1990) ("Discretionary release of a document pertains to that document alone, regardless of whether similar documents exist."), rev'd on other grounds, 964 F.2d 1205 (D.C. Cir. 1992); see also, e.g., United States Student Ass'n v. CIA, 620 F. Supp. 565, 571 (D.D.C. 1985) (no waiver through prior disclosure except as to "duplicate" information); Dow, Lohnes & Albertson v. Presidential Comm'n on Broad. to Cuba, 624 F. Supp. 572, 578 (D.D.C. 1984) (same); cf. Silber v. United States Dep't of Justice, No. 91-876, transcript at 18 (D.D.C. Aug. 13, 1992) (bench order) (no waiver would be found even if it were to be established that other comparable documents had been disclosed).

⁶⁰ 879 F.2d at 701; see also Army Times, 998 F.2d at 1068 (articulating general principle of no waiver of exemption simply because agency released "information similar to that requested" in past); Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978) ("The government is not estopped from concluding in one case that disclosure is permissible while in another case it is not.").

⁶¹ Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 712 n.34 (D.C. Cir. 1977).

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incentive against voluntary disclosure of information."⁶²

By this very same token, moreover, when discretionary disclosures are made by agencies in accordance with Attorney General Reno's FOIA Memorandum, courts should find that they do not constitute a basis for awarding attorneys fees under the Act.⁶³ Agencies ought to feel free to make discretionary disclosures of exempt information, at any stage of the FOIA administrative or litigative process, without concern for such consequences either.⁶⁴ While agen

⁶² Mehl v. EPA, 797 F. Supp. 43, 47 (D.D.C. 1992); see also Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981) (agency should not be penalized for declassifying and releasing documents during litigation; otherwise, there would be "a disincentive for an agency to reappraise its position and, when appropriate, release documents previously withheld"); Shewchun v. INS, No. 95-1920, slip op. at 8 (D.D.C. Dec. 10, 1995) (to find agency bad faith after agency conducted new search and released more information "would create a disincentive for agencies to conduct reviews of their initial searches"), summary affirmance granted, No. 97-5044 (D.C. Cir. June 5, 1997); Berg v. United States Dep't of Energy, No. 94-0488, slip op. at 8 (D.D.C. Nov. 7, 1994) (release of information after initial search does not prove inadequacy of search; to hold otherwise would end "laudable agency practice of updating and re-considering the release of information after the completion of the initial FOIA search"); Gilmore v. NSA, No. 92-3646, slip op. at 22 (N.D. Cal. May 3, 1993) (following Military Audit and declining to penalize agency); Stone v. FBI, 727 F. Supp. 662, 666 (D.D.C. 1990) (agencies should be free to make "voluntary" disclosures without concern that they "could come back to haunt" them in other cases); cf. Public Citizen v. Department of State, 11 F.3d 198, 203 (D.C. Cir. 1993) (agency should not be required to disclose "related materials" where "to do so would give the Government a strong disincentive ever to provide its citizenry with briefings of any kind on sensitive topics").

⁶³ See Lovell v. Alderete, 630 F.2d 428, 432 & n.4 (5th Cir. 1980) (alternative holding) ("[The] Government's compliance with [plaintiff's] request was not caused mainly by the institution of the suit, but rather was also affected by a change in the United States Attorney General's [May 5, 1977] guidelines concerning disclosure of exempted materials."); cf. Bubar v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 83,218, at 89,930-31 (D.D.C. June 13, 1983) (no attorneys fees appropriate when disclosure was caused by administrative reprocessing of request "pursuant to newly-adopted procedures"). But see O'Neill, Lysaght & Sun v. DEA, 951 F. Supp. 1413, 1423 (C.D. Cal. 1996) ("That the suit was pending at the time of the new directives is the reason the request was eligible for reevaluation."); cf. McDonnell v. United States, 870 F. Supp. 576, 583-84 (D.N.J. 1994) (causation found when plaintiff challenged government's longstanding withholding practice and entirely separate case contemporaneously proceeding through judicial system ultimately resulted in Supreme Court modification of government's stance and yielded additional disclosures to plaintiff).

⁶⁴ See Nationwide, 559 F.2d at 712 n.34 ("Certainly where the government can show that information disclosed . . . was nonetheless exempt from the FOIA a

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cies are strongly encouraged to make such disclosures at the outset of the administrative process,⁶⁵ one court has had occasion to express this principle in broad terms:

Were the courts to construe disclosure of a document as an agency's concession of wrongful withholding, . . . agencies would be forced to either never disclose a document once withheld or risk being assessed fees. This result would frustrate the policy of encouraging disclosure that prompted enactment of the FOIA and its amendments. . . . Penalizing an agency for disclosure at any stage of the proceedings is simply not in the spirit of the FOIA.⁶⁶

Agencies should be mindful, though, that these principles apply to true discretionary disclosures made under the FOIA--which should be made available to anyone--as distinguished from any "selective" disclosure made more narrowly outside the context of the FOIA.⁶⁷ Such non-FOIA disclosures can lead to more difficult waiver questions.

Waiver

Sometimes, when a FOIA exemption is being invoked, a further inquiry must be undertaken: a determination of whether, through some prior disclosure or an express authorization, the applicability of the exemption has been waived. Resolution of this inquiry requires a careful analysis of the specific nature of and

⁶⁴(...continued)

plaintiff should not be awarded attorney fees."); see also FOIA Update, Fall 1994, at 7 (listing examples of discretionary disclosures in FOIA litigation); cf. Public Law Educ. Inst. v. United States Dep't of Justice, 744 F.2d 181, 183-84 (D.C. Cir. 1984) (no attorneys fees liability when agency disclosed requested records discretionarily in related proceeding).

⁶⁵ See FOIA Update, Summer/Fall 1993, at 1-2; see also FOIA Update, Spring 1997, at 1 (emphasizing importance of discretionary disclosure in agency decisionmaking).

⁶⁶ American Commercial Barge Lines v. NLRB, 758 F.2d 1109, 1112 (6th Cir. 1985).

⁶⁷ See, e.g., North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) (finding waiver when agency made "selective" disclosure to one interested party only); Committee to Bridge the Gap v. Department of Energy, No. 90-3568, transcript at 5 (C.D. Cal. Oct. 11, 1991) (bench order) (waiver found when agency gave preferential treatment to interested party; such action is "offensive" to FOIA and "fosters precisely the distrust of government the FOIA was intended to obviate"), aff'd on other grounds, 10 F.3d 808 (9th Cir. 1993) (unpublished table decision).

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circumstances surrounding the prior disclosure involved.⁶⁸ First and foremost, if the prior disclosure does not "match" the exempt information in question, the difference between the two might itself be a sufficient basis for reaching the conclusion that no waiver has occurred.⁶⁹

Although courts are generally sympathetic to the necessities of effective

⁶⁸ See FOIA Update, Spring 1983, at 6; see also Mobil Oil Corp. v. EPA, 879 F.2d 698, 700 (9th Cir. 1989) ("The inquiry into whether a specific disclosure constitutes a waiver is fact specific."); Carson v. United States Dep't of Justice, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980) ("[T]he extent to which prior agency disclosure may constitute a waiver of the FOIA exemptions must depend both on the circumstances of prior disclosure and on the particular exemptions claimed.").

⁶⁹ See, e.g., Public Citizen v. Department of State, 11 F.3d 198, 201 (D.C. Cir. 1993) (finding that "agency official does not waive FOIA exemption 1 by publicly discussing the general subject matter of documents which are otherwise properly exempt from disclosure"); Afshar v. Department of State, 702 F.2d 1125, 1132 (D.C. Cir. 1983) (finding that "withheld information is in some material respect different" from that which requester claimed had been released previously); Kimberlin v. Department of Justice, 921 F. Supp. 833, 836 (D.D.C. 1996) (holding that public acknowledgment of investigation does not waive use of Exemption 7(C) on underlying documents); Dow Jones & Co. v. United States Dep't of Justice, 880 F. Supp. 145, 151 (S.D.N.Y. 1995) (agency's "limited, general and cursory discussions" of investigative subject matter during press conference held not to waive Exemption 7(A)), vacated on other grounds, 907 F. Supp. 79 (S.D.N.Y. 1995); Kay v. FCC, 867 F. Supp. 11, 20-21 (D.D.C. 1994) (inadvertent disclosure of some informants' names does not waive Exemption 7(A) protection for information about other informants); Blazar v. OMB, No. 92-2719, slip op. at 11-12 (D.D.C. Apr. 15, 1994) (following Public Citizen and finding no waiver of Exemptions 1 and 3 when published autobiography refers to information sought but provides no more than general outline of it); see also, e.g., Fitzgibbon v. CIA, 911 F.2d 755, 766 (D.C. Cir. 1990) (no waiver when withheld information "pertain[s] to a time period later than the date of the publicly documented information"); Freeman v. United States Dep't of Justice, No. 92-0557, slip op. at 9 (D.D.C. June 28, 1993) (no waiver when requester failed to show that information available to public duplicates that being withheld); Hunt v. FBI, No. C-92-1390, slip op. at 15-16 (N.D. Cal. Sept. 16, 1992) (agency not required to disclose documents when "similar" ones were previously released; none of released documents were "as specific as" or "matched" requested documents). But see Committee to Bridge the Gap v. Department of Energy, No. 90-3568, transcript at 2-5 (C.D. Cal. Oct. 11, 1991) (bench order) (distinguishing Mobil Oil and finding deliberative process privilege waived for draft order by prior voluntary disclosure of earlier draft order to interested party; agency ordered to release earlier draft order and all subsequent revisions), aff'd on other grounds, 10 F.3d 808 (9th Cir. 1993) (unpublished table decision); Washington Post Co. v. United States Dep't of the Air Force, 617 F. Supp. 602, 605 (D.D.C. 1985) (disclosure of document's conclusions waived privilege for body of document).

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agency functioning when confronted with an issue of waiver,⁷⁰ courts do look harshly upon prior disclosures that result in unfairness.⁷¹ In one case, Hopkins v. Department of the Navy,⁷² a commercial life insurance company sought access to records reflecting the name, rank, and duty locations of servicemen stationed at Quantico Marine Corps Base. The district court, while not technically applying the doctrine of waiver, rejected the agency's privacy arguments on the grounds that officers' reassignment stations were routinely published in the Navy Times and that the Department of Defense had disclosed the names and addresses of 1.4 million service members to a political campaign committee.⁷³

⁷⁰ See, e.g., Schiffer v. FBI, 78 F.3d 1405, 1410-11 (9th Cir. 1996) (finding no waiver of FBI's right to invoke Exemption 7(C) for information made public during related civil action); Massey v. FBI, 3 F.3d 620, 624 (2d Cir. 1993) (individuals held not to waive "strong privacy interests in government documents containing information about them even where the information may have been public at one time"); Irons v. FBI, 880 F.2d 1446, 1456-57 (1st Cir. 1989) (en banc) (public testimony by confidential source does not waive FBI's right to withhold information pursuant to Exemption 7(D)); Cooper v. Department of the Navy, 558 F.2d 274, 278 (5th Cir. 1977) (prior disclosure of aircraft accident investigation report to aircraft manufacturer held not to constitute waiver); McGilvra v. National Transp. Safety Bd., 840 F. Supp. 100, 102 (D. Colo. 1993) (citing Cooper and finding that release of cockpit voice recorder tapes to parties in accident investigation is not "public" disclosure under FOIA); Van Atta v. Defense Intelligence Agency, No. 87-1508, slip op. at 5-6 (D.D.C. July 6, 1988) (disclosure to foreign government does not constitute waiver); Medera Community Hosp. v. United States, No. 86-542, slip op. at 6-9 (E.D. Cal. June 28, 1988) (no waiver where memoranda interpreting agency's regulations sent to state auditor involved in enforcement proceeding); Erb v. United States Dep't of Justice, 572 F. Supp. 954, 956 (W.D. Mich. 1983) (nondisclosure under Exemption 7(A) upheld after "limited disclosure" of FBI criminal investigative report to defense attorney and state prosecutor); cf. Gilmore v. NSA, No. 92-3646, slip op. at 17 (N.D. Cal. May 3, 1993) (fact that material was once in public domain does not prove its subsequent classification is invalid).

⁷¹ See, e.g., North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 182 (8th Cir. 1978) ("selective disclosure" of record to one party in litigation deemed "offensive" to FOIA and held to prevent agency's subsequent invocation of Exemption 5 against other party to litigation); Committee to Bridge the Gap, No. 90-3568, transcript at 3-5 (C.D. Cal. Oct. 11, 1991) (bench order) (deliberative process privilege waived for draft order by prior voluntary disclosure of earlier draft order to interested party; selective disclosure is "offensive" to FOIA); Northwest Env'tl. Defense Ctr. v. United States Forest Serv., No. 91-125, slip op. at 12 (D. Or. Aug. 23, 1991) (magistrate's recommendation) (deliberative process privilege waived as to portion of agency report discussed with "interested" third party), adopted (D. Or. Feb. 12, 1992).

⁷² No. 84-1868, slip op. at 5-6 (D.D.C. Feb. 5, 1985).

⁷³ Id. at 6; see also In re Subpoena Duces Tecum, 738 F.2d 1367, 1371-74

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An agency's failure to heed even its own regulations regarding circulation of internal agency documents was found determinative and led to a finding of waiver.⁷⁴ Similarly, an agency's personnel regulation requiring disclosure of (or a promise by an agency official to disclose) the information,⁷⁵ an agency's carelessness in permitting access to certain information,⁷⁶ and an agency's mistaken disclosure of the contents of a document⁷⁷ have all resulted in waiver.⁷⁸

On the other hand, waiver is not necessarily found when an agency makes an entirely mistaken disclosure.⁷⁹ And it has been firmly held that the mere fact

⁷³(...continued)

(D.C. Cir. 1984) (voluntary disclosure by private party of information to one agency waived attorney work-product and attorney-client privileges when same information was sought by second agency) (non-FOIA case).

⁷⁴ Shermco Indus. v. Secretary of the Air Force, 613 F.2d 1314, 1320 (5th Cir. 1980).

⁷⁵ See Johnson v. HHS, No. 88-243-5, slip op. at 10-11 (E.D.N.C. Feb. 7, 1989).

⁷⁶ See, e.g., Cooper v. Department of the Navy, 594 F.2d 484, 488 (5th Cir. 1978).

⁷⁷ See, e.g., Dresser Indus. Valve Operations, Inc. v. EEOC, 2 Gov't Disclosure Serv. (P-H) ¶ 82,197, at 82,575 (W.D. La. Jan. 19, 1982).

⁷⁸ See also Gannett River States Publ'g Corp. v. Bureau of the Nat'l Guard, No. J91-0455-L, slip op. at 14 (S.D. Miss. Mar. 2, 1992) (privacy interests in withholding identities of soldiers disciplined for causing accident is de minimis because agency previously released much identifying information); Powell v. United States, 584 F. Supp. 1508, 1520-21 (N.D. Cal. 1984) (suggesting that attorney work-product privilege may be waived when agency made earlier release of such information which "reflect[ed] positively" on agency, and later may have withheld work-product information on same matter which did not reflect so "positively" on agency).

⁷⁹ See Martin Marietta Corp. v. Dalton, No. 94-2702, 1997 WL 459831, at *3 (D.D.C. Aug. 8, 1997) (finding no waiver under Exemption 4 where prior release of data in contract had been made); Public Citizen Health Research Group v. FDA, 953 F. Supp. 400, 404-06 (D.D.C. 1996) (holding no waiver where material accidentally released and information not disseminated by requester); Nation Magazine v. Department of State, 805 F. Supp. 68, 73 (D.D.C. 1992) (dicta) ("[N]o rule of administrative law requires an agency to extend erroneous treatment of one party to other parties, `thereby turning an isolated error into a uniform misapplication of the law.'" (quoting Sacred Heart Med. Ctr. v. Sullivan, 958 F.2d 537, 548 n.24 (3d Cir. 1992))); Astley v. Lawson, No. 89-2806, slip op. at 20 (D.D.C. Jan. 11, 1991) (inadvertent placement of documents into public record held not to waive exemption when it was remedied immediately upon agency's awareness of mistake); cf. Kay, 867 F. Supp. at 23-24 (inadvertent disclosure of documents caused entirely by clerical error has no effect on remaining material (continued...))

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that a confidential source testifies at a trial does not waive Exemption 7(D) protection for any source-provided information not actually revealed in public.⁸⁰ Nor does public congressional testimony waive Exemption 1 protection when the context of the information publicized is different and only some of the information is revealed.⁸¹ Furthermore, disclosure in a congressional report does not waive Exemption 1 applicability if the agency itself has never publicly

⁷⁹(...continued)

at issue); Fleet Nat'l Bank v. Tonneson & Co., 150 F.R.D. 10, 16 (D. Mass. 1993) (inadvertent production of one volume of three-volume report did not constitute waiver of attorney work-product privilege as to that volume, nor as to remaining two volumes of report) (non-FOIA case); Myers v. Williams, No. 92-1609, 1993 U.S. Dist. LEXIS 5304, at **5-7 (D. Or. Apr. 21, 1993) (preliminary injunction granted prohibiting FOIA requester from disclosing original and all copies of erroneously disclosed document containing trade secrets) (non-FOIA case).

⁸⁰ See Irons, 880 F.2d at 1454; Housley v. DEA, No. 92-16946, slip op. at 4 (9th Cir. May 4, 1994) (fact that some information may have been disclosed at criminal trial does not result in waiver as to other information); see also Davoudlarian v. Department of Justice, No. 93-1787, slip op. at 5 (4th Cir. Aug. 15, 1994) (per curiam) (requester must demonstrate that specific witness statements were disclosed at civil trial in order to show waiver); Jones v. FBI, No. C77-1001, slip op. at 13-14 (N.D. Ohio Aug. 12, 1992) (identities of confidential informants and third parties are not waived even if they have testified in court and are publicly known), aff'd, 41 F.3d 238, 249 (6th Cir. 1994) (Exemption 7(D) "focuses on the source's intent, not the world's knowledge [H]old[ing] otherwise would discourage sources from cooperating with the FBI because of fear of revelation via FOIA."); LaRouche v. United States Dep't of Justice, No. 90-2753, slip op. at 14 (D.D.C. June 24, 1993) (agency must review requested file and disclose those portions which were revealed at trial); Church of Scientology Int'l v. FBI, No. 91-10850-Y, slip op. at 4-5 (D. Mass. Nov. 23, 1992) (privacy protection waived for information about individuals who publicly testified at trial and who have been identified). But see Williams v. FBI, 822 F. Supp. 808, 814 n.3 (D.D.C. 1993) (public testimony by confidential sources does not waive exemption); cf. Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 25-26 (D. Mass. Nov. 12, 1992) (neither testimony at trial nor actual trial itself waives protection for documents prepared in anticipation of litigation); Wechsler v. United States Consumer Prod. Safety Comm'n, No. 92-402, slip op. at 4 (S.D. Fla. Oct. 19, 1992) (magistrate's recommendation) (fact that confidential source and/or confidential information may subsequently be disclosed does not affect exemption), adopted sub nom. United States v. United States Consumer Prod. Safety Comm'n (S.D. Fla. Dec. 1, 1992).

⁸¹ See Fitzgibbon, 911 F.2d at 765 (prior disclosure does not waive "information pertaining to a time period later than the date of the publicly documented information"); Public Citizen, 11 F.3d at 201 (finding no waiver when agency official publicly discussed general subject matter of documents); see also Afshar, 702 F.2d at 1131-32 (finding no waiver when withheld information is in some respect materially different).

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acknowledged the information.⁸²

In one case it was held that the oral disclosure of only the conclusion reached in a predecisional document "does not, without more, waive the [deliberative process] privilege."⁸³ In another, an agency disclosure to a small group of nongovernmental personnel, with no copies permitted, was held not to inhibit agency decisionmaking, so the deliberative process privilege was not waived.⁸⁴ Nonetheless, an oral disclosure may be treated as not so different from a written one, risking a waiver result.⁸⁵

As is suggested above, if the agency is able to establish that it acted responsibly and in furtherance of a legitimate governmental purpose, its later claim of exemption will likely prevail.⁸⁶ Of course, circulation of a document within the agency does not waive an exemption,⁸⁷ nor does disclosure among agencies,⁸⁸ or

⁸² See Earth Pledge Found. v. CIA, 95 Civ 0257, 1996 WL 694427, at *5 (S.D.N.Y. Dec. 4, 1996); see also Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (holding that information in Senate report "cannot be equated with disclosure by the agency itself"); Military Audit Project v. Casey, 656 F.2d 724, 744 (D.C. Cir. 1981) (finding that publication of Senate report does not constitute official release of agency information).

⁸³ Morrison v. United States Dep't of Justice, No. 87-3394, slip op. at 3 (D.D.C. Apr. 29, 1988).

⁸⁴ Dow, Lohnes & Albertson v. Presidential Comm'n on Broad. to Cuba, 624 F. Supp. 572, 577-78 (D.D.C. 1984); see also Brinderson Constructors, Inc. v. Army Corps of Eng'rs, No. 85-0905, slip op. at 12 (D.D.C. June 11, 1986) (requester's participation in agency enterprise did not entitle requester to all related documents).

⁸⁵ See Myles-Pirzada v. Department of the Army, No. 91-1080, slip op. at 6 (D.D.C. Nov. 20, 1992) (finding privilege waived when agency official read report to requester over telephone); Shell Oil Co. v. IRS, 772 F. Supp. 202, 211 (D. Del. 1991) (finding waiver when agency employee read aloud entire draft document at public meeting: "Where an authorized disclosure is voluntarily made to a non-federal party, the government waives any claim that the information is exempt from disclosure under the deliberative process privilege.").

⁸⁶ See FOIA Update, Spring 1983, at 6; see, e.g., McGivra, 840 F. Supp. at 102 (release of cockpit voice recorder tapes to parties in accident investigation); Badhwar v. United States Dep't of the Air Force, 629 F. Supp. 478, 481 (D.D.C. 1986) (disclosure to outside person held necessary to assemble report in first place), aff'd in part & remanded in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); FOIA Update, Winter 1984, at 4.

⁸⁷ See, e.g., Direct Response Consulting Serv. v. IRS, No. 94-1156, slip op. at 6 (D.D.C. Aug. 21, 1995) (attorney-client privilege not waived when documents sent to other divisions within agency); Chemcentral/Grand Rapids Corp. v. EPA, No. 91-C-4380, slip op. at 12-14 (N.D. Ill. Oct. 5, 1992) (no waiver of attorney-

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to advisory committees (even those including members of the public).⁸⁹ Similarly, deference to the common agency practice of disclosing specifically requested information to a congressional committee,⁹⁰ or to the General Accounting Office (an arm of Congress),⁹¹ or to state attorneys general,⁹² does not waive FOIA exemption protection for that information.

Indeed, when an agency has been compelled to disclose a document under limited and controlled conditions, such as under a protective order in an administrative proceeding, its authority to withhold the document thereafter is not diminished.⁹³ This applies as well to other disclosures in the criminal discovery

⁸⁷(...continued)

client privilege when documents in question were circulated to only those employees who needed to review legal advice contained in it); Lasker-Goldman Corp. v. GSA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,125, at 81,322 (D.D.C. Feb. 27, 1981) (no waiver when document was circulated to management officials within agency).

⁸⁸ See, e.g., Chilivis v. SEC, 673 F.2d 1205, 1211-12 (11th Cir. 1982) (agency does not automatically waive exemption by releasing documents to other agencies); Silber v. United States Dep't of Justice, No. 91-876, transcript at 10-18 (D.D.C. Aug. 13, 1992) (bench order) (distribution of manual to other agencies does not constitute waiver). But cf. Lacefield v. United States, No. 92-N-1680, slip op. at 11 (D. Colo. Mar. 10, 1993) (attorney-client privilege waived with respect to letter from City of Denver attorney to Colorado Department of Safety because letter was circulated to IRS).

⁸⁹ See, e.g., Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 107-08 (D.C. Cir. 1976).

⁹⁰ See, e.g., Florida House of Representatives v. United States Dep't of Commerce, 961 F.2d 941, 946 (11th Cir.) (holding no waiver of exemption due to court-ordered disclosure, involuntary disclosure to Congress, or disclosure of related information); Aspin v. DOD, 491 F.2d 24, 26 (D.C. Cir. 1973); see also Eagle-Picher Indus. v. United States, 11 Ct. Cl. 452, 460-61 (1987) (work-product privilege not waived in nonspecific congressional testimony "if potentially thousands of documents need be reviewed to determine if the gist or a significant part of documents were revealed") (non-FOIA case); FOIA Update, Winter 1984, at 3-4 ("OIP Guidance: Congressional Access Under FOIA") (analyzing and cabining Murphy v. Department of the Army, 613 F.2d 1151 (D.C. Cir. 1979)).

⁹¹ See, e.g., Shermco, 613 F.2d at 1320-21.

⁹² See Interco, Inc. v. FTC, 490 F. Supp. 39, 44 (D.D.C. 1979).

⁹³ See, e.g., Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 79 n.13 (2d Cir. 1979); see also Allnet Communication Servs. v. FCC, 800 F. Supp. 984, 989 (D.D.C. 1992) (no waiver where information disclosed under "strict confidentiality"), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994); Silverberg v. HHS, No. 89-2743, slip op. at 7 (D.D.C. June 14, 1991) (fact that individual who is subject of drug

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context.⁹⁴

The one circumstance in which an agency's failure to treat information in a responsible, appropriate fashion should not result in waiver is when the failure is not fairly attributable to the agency--i.e., when an agency employee has made an unauthorized disclosure, a "leak" of information. Recognizing that a finding of waiver in such circumstances would only lead to "exacerbation of the harm created by the leaks,"⁹⁵ the courts have consistently refused to penalize agencies by holding that because of such conduct a waiver has occurred.⁹⁶

⁹³(...continued)

test by particular laboratory has right of access to its performance and testing information does not render such information publicly available), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993).

⁹⁴ See, e.g., Ferguson v. FBI, 957 F.2d 1059, 1068 (2d Cir. 1992) (fact that local police department released records pursuant to New York Freedom of Information Law and one of its officers testified at length in court held not to waive police department's status as confidential source under Exemption 7(D)); Parker v. Department of Justice, 934 F.2d 375, 379 (D.C. Cir. 1991) (nondisclosure under Exemption 7(D) upheld even though confidential informant may have testified at requester's trial); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 12 (D.D.C. 1991) (even if some of withheld information has appeared in print, nondisclosure is proper because disclosure from official source would confirm unofficial information and thereby cause harm to third parties); Beck v. United States Dep't of Justice, No. 88-3433, slip op. at 2 (D.D.C. July 24, 1991) ("Exemption 7(C) is not necessarily waived where an individual has testified at trial."), summary affirmance granted in pertinent part & denied in part, No. 91-5292 (D.C. Cir. Nov. 19, 1992); Glick v. Department of Justice, No. 89-3279, slip op. at 8 (D.D.C. June 20, 1991) (fact that agency discloses information in one context does not waive confidentiality of information or of those who provide it); Crooker v. ATF, No. 85-615, slip op. at 4-5 (D.D.C. Aug. 2, 1985) (nondisclosure under Exemption 7(A) upheld even though requester reviewed document in prior parole hearing), rev'd on other grounds, 789 F.2d 64 (D.C. Cir. 1986); Erb, 572 F. Supp. at 956 (nondisclosure to third party upheld under Exemption 7(A) even though document provided to defendant through criminal discovery); Krohn v. Department of Justice, 3 Gov't Disclosure Serv. (P-H) ¶ 83,120, at 83,724 (D.D.C. Sept. 7, 1979) (nondisclosure under Exemption 7(D) upheld even though requester previously reviewed documents as defendant in criminal discovery). But see Kronberg v. United States Dep't of Justice, 875 F. Supp. 861, 867 (D.D.C. 1995) (waiver of exemption found when agency had previously released same documents during requester's criminal trial).

⁹⁵ Murphy, 490 F. Supp. at 1142.

⁹⁶ See, e.g., Simmons v. United States Dep't of Justice, 796 F.2d 709, 712 (4th Cir. 1986) (unauthorized disclosure does not constitute waiver); Medina-Hincapie v. Department of State, 700 F.2d 737, 742 n.20 (D.C. Cir. 1983) (official's ultra vires release does not constitute waiver); Harper v. Department of Justice, No.

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On the other hand, "official" disclosures--i.e., direct acknowledgments by authoritative government officials--may well waive an otherwise applicable FOIA exemption.⁹⁷ In this context, one decision held that information that was the sub-

⁹⁶(...continued)

92-462, slip op. at 19 (D. Or. Aug. 9, 1993) ("alleged, unauthorized, unofficial, partial disclosure" in private publication does not waive Exemption 1), aff'd in part, rev'd in part & remanded on other grounds sub nom. Harper v. DOD, 60 F.3d 833 (9th Cir. 1995) (unpublished table decision); LaRouche, No. 90-2753, slip op. at 14 (D.D.C. June 4, 1993) (fact that some aspects of grand jury proceeding were leaked to press has "no bearing" on FOIA litigation); RTC v. Dean, 813 F. Supp. 1426, 1429-30 (D. Ariz. 1993) (no waiver of attorney-client privilege when agency took precautions to secure confidentiality of document, but inexplicable leak nonetheless occurred) (non-FOIA case); Silber, No. 91-876, transcript at 18 (D.D.C. Aug. 13, 1992) (bench order) (unauthorized publication of parts of document does not constitute any waiver); Washington Post Co. v. DOD, No. 84-2949, slip op. at 17 n.9 (D.D.C. Feb. 25, 1987) ("unprincipled disclosure" by Members of Congress who had signed statements of confidentiality "cannot be the basis to compel disclosure" by agency); Laborers' Int'l Union v. United States Dep't of Justice, 578 F. Supp. 52, 58 n.3 (D.D.C. 1983), aff'd, 772 F.2d 919 (D.C. Cir. 1984); Safeway Stores, Inc. v. FTC, 428 F. Supp. 346, 347-48 (D.D.C. 1977) (finding no waiver where congressional committee leaked report to press); cf. Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992) (agency not required to confirm or deny accuracy of information released by other government agencies regarding its interest in certain individuals); Rush v. Department of State, 748 F. Supp. 1548, 1556 (S.D. Fla. 1990) (finding that author of agency documents, who had since left government service, did not have authority to waive Exemption 5 protection). But cf. In re Engram, No. 91-1722, slip op. at 3, 6-7 (4th Cir. June 2, 1992) (per curiam) (permitting discovery as to circumstances of suspected leak).

⁹⁷ See Abbotts v. NRC, 766 F.2d 604, 607-08 (D.C. Cir. 1985); Kimberlin, 921 F. Supp. at 835-36 (holding exemption waived when material was released pursuant to "valid, albeit misunderstood authorization"); Quinn v. HHS, 838 F. Supp. 70, 75 (W.D.N.Y. 1993) (attorney work-product privilege waived where "substantially identical" information was previously released to requester); Myles-Pirzada, No. 91-1080, slip op. at 6 (D.D.C. Nov. 20, 1992) (privilege waived when agency official read report to requester over telephone); Schlesinger v. CIA, 591 F. Supp. 60, 66 (D.D.C. 1984); see also Krikorian v. Department of State, 984 F.2d 461, 467-68 (D.C. Cir. 1993) (court on remand must determine whether redacted portions of document has been "officially acknowledged"); United States Student Ass'n, 620 F. Supp. at 571 (waiver found for prior disclosure of "duplicate" information); cf. Afshar, 702 F.2d at 1133 (books by former agency officials do not constitute "an official and documented disclosure"); Armstrong v. Executive Office of the President, No. 89-142, slip op. at 16-17 (D.D.C. July 28, 1995) (book by former agency official containing information "substantially different" from documents sought is not official disclosure); Hunt, No. C-92-1390, slip op. at 16-18 (N.D. Cal. Sept. 16, 1992) (alleged nongovernmental disclosure of contents of requested documents does not constitute "official" ac-

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ject of an "off-the-record" disclosure to the press cannot be protected under Exemption 1.⁹⁸ Similarly, an individual's express disclosure authorization with respect to his own interests implicated in requested records can also

⁹⁷(...continued)

knowledge); Holland v. CIA, No. 91-1233, slip op. at 13-14 (D.D.C. Aug. 31, 1992) (applying Afshar and finding that requester has not demonstrated that specific information in public domain has been "officially acknowledged").

⁹⁸ Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989), motion for reargument denied, No. 87-Civ-1115, slip op. at 1-3 (S.D.N.Y. May 23, 1990).